IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No.12300 of 2005

For Approval and Signature:
HONOURABLE MR.JUSTICE D.A.MEHTA Sd/-

HONOURABLE MS.JUSTICE H.N.DEVANI Sd/-

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

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MAHENDRA PETROCHEMICALS LTD. & 1 - Petitioner(s)
Versus
UNION OF INDIA THR' SECRETARY & 3 - Respondent(s)

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Appearance :
MR PARESH M DAVE for Petitioner(s) : 1 - 2.
MR JITENDRA MALKAN for Respondent(s) : 1,
RULE SERVED for Respondent(s) : 2,
MR YN RAVANI for Respondent(s) : 3 - 4.

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CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA
and
HONOURABLE MS.JUSTICE H.N.DEVANI
Date : 22/12/2005
ORAL JUDGMENT
(Per : HONOURABLE MR.JUSTICE D.A.MEHTA)

1. By this petition, under Article 226 of the Constitution of India, the petitioner has

challenged Misc. Order dated 16th May, 2005 bearing No.2/CUS/2005 made by the Customs & Central Excise Settlement Commission, Mumbai (the Settlement Commission), whereby the immunities granted to the petitioner in terms of Section 127H of the Customs Act, 1962 (the Act) were withdrawn by exercise of powers under Section 127H(2) of the Act.

2. The petitioner approached the Settlement Commission in relation to dispute with the Director General of Foreign Trade. It is not necessary to refer to the interim proceedings that took place. Suffice it to state that on 19th October, 2004 the Settlement Commission passed final order No.57/2004-CUS settling the case by determining the liability of the petitioner at a sum of Rs.73,09,326.80. While passing the final order the petitioner was granted immunity against imposition of penalty and fine. In relation to the liability to pay interest, the Settlement Commission fixed the rate of interest

at 10% p.a. stating that in light of the true and full disclosure made by the petitioner as to its liability and the co-operation extended in finalizing the case, the said rate of interest would be appropriate. Accordingly, the liability to pay interest to the extent of Rs.23,51,523/- arose on the day the Settlement Commission passed the final order.

3. The principal grievance of the petitioner is that on account of its weak financial position it was not possible for the petitioner to make payment of interest within the period of 30 days from the date of final order as directed and hence, as the petitioner could not comply with the directions made by the Settlement Commission, the petitioner applied for extension of time. On 8th February, 2005, the Settlement Commission informed the petitioner that extension was granted upto 31st March, 2005.

4. As the petitioner could not discharge the total liability of interest by then, on 28th March,

2005 another application came to be moved with a request to grant further extension of time and permit the petitioner to make payment of interest in installments of Rs.2,00,000/- p.m. In support of the application it was contended that there were accumulated losses of more than Rs.64 crores and the case of the petitioner-Company was before the BIFR. The Settlement Commission did not accept the second request for extension as well as the request to make payment by way of installments and while rejecting the same passed the impugned order withdrawing the immunity granted to the petitioner in exercise of powers under Section 127H(2) of the Act.

5. When the petition came up for admission it was made clear to the learned advocate for the petitioner that the Court may intervene provided the petitioner not only discharges its liability to pay the interest of Rs.23,56,651/- as directed by the Settlement Commission but also pays interest on such delayed payments. It is an

accepted position between the parties that as on 10th December, 2005 the petitioner has made total payment of the outstanding amount of interest i.e. 23,56,651/-.

6. In these circumstances, the impugned order dated 16th May, 2005 made by the Settlement Commission cannot be permitted to stand. There is no dispute, and none was raised before this Court, that the Settlement Commission does not have powers under Section 127H(2) of the Act to withdraw the immunity granted to a person if such person fails to make payment of the specified sum within the specified time or within such extended time as the Settlement Commission allows. The question is, when a person who has discharged the liability fixed by the Settlement Commission and is ready and willing to make payment of the interest thereon, should such person be denied the opportunity of doing so in form of installments, when the financial condition of the person is such that

it may not be possible for it to make payment of a sum more than Rs.20 lakhs at one stroke. It is not as if the Settlement Commission does not have powers to extend the period or that the power to grant extension is hedged in any manner whatsoever. Even if one assumes that belated payment might result in prejudice to the Revenue, such prejudice can be redressed by ordering payment of further interest on such delayed payment.

7. However, at the same time it is necessary to bear in mind that in a case where the Settlement Commission finds, or there is evidence on record, to suggest that the person whose case is settled is not making payment of the specified sum within the specified time and is trying to derive an undue advantage, it would always be open to the Settlement Commission to exercise its power of withdrawal of immunity under Section 127H(2) of the Act. In short, in each case, the matter has to be decided after taking

into consideration the facts and circumstances peculiar to the case. The Court is not laying down any general proposition as such as to in what circumstance the said power can be or cannot be exercised.

8. In the present case, as the facts reveal, the Settlement Commission has not even heard the petitioner before passing the impugned order dated 16th May, 2005. In the subsequent application seeking further extension of time and payment by way of installments the petitioner had categorically referred to its weak financial position and pendency of case before the BIFR. The petitioner has also given reasons for the weak financial position. Instead of passing an order without hearing the petitioner, it would have been appropriate for the Settlement Commission to have given a hearing to the parties and, if necessary, called upon the petitioner to establish its case in support of its prayer to grant further extension

and facility of payment by installments. The petitioner has discharged its liability when it was permitted to make payment of outstanding interest by installments and in these circumstances, the bonafides of the petitioner are required to be accepted. The petitioner has also expressed its willingness to make payment of interest on such delayed payments and by way of proposal it has placed on record a sheet containing computation of interest relatable to each of the installments paid from time to time. Though initially, on behalf of the respondents it was submitted that the rate of interest fixed by the Settlement Commission at 10% may be adopted and be continued even in relation to the delayed payments, both the parties have left it to the Court to decide the appropriate rate of interest that may be applied in the facts and circumstances of the case.

9. In light of what is stated hereinbefore, the Court deems it appropriate that the petitioner

be directed to bear interest on delayed payments from time to time at the rate of 6% p.a. taking into consideration the prevailing market conditions and the bank rate. The Court feels that in the interest of justice, rate of 6% p.a. would be fair and reasonable.

10. The said amount as computed by the petitioner from 1st January, 2005 till date of payment viz. 10th December, 2005 comes to Rs.93,933/-. However, as the petitioner has sought time of 3-4 weeks for making the payment, to ensure that the remaining period also gets taken care of, it would be proper to round off the said amount to a figure of Rs.1,00,000/-. The petitioner is directed to make the payment of the said sum on or before 13th January, 2006.

11. Accordingly, the impugned order being Misc. Order No.2/CUS/2005 dated 16th May, 2005 (at Annexure-G to the petition) is hereby quashed and set aside and the final order made by the

Settlement Commission shall remain in operation, subject to the petitioner making the payment as aforesaid of a sum of Rs.1,00,000/- (Rupees One lakh only) by the specified date.

12. The petition is, accordingly, allowed. Rule made absolute. The petitioners to pay costs quantified at Rs.1,000/- (Rupees One Thousand only) to the respondents.

Sd/-
[D.A. MEHTA, J]

Sd/-
[H.N. DEVANI, J]

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*Bhavesh**